IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR.

JUDGMENT

Ranchod B. Das vs. LRs of Kanhaiya Lal.

S.B. Civil Regular Second Appeal No.145/1997 under Section 100, C.P.C. against the judgment and decree dated 5.4.1997 passed by the Addl. District Judge No.3, Jodhpur in C.A.D. No.60/1994.

Date of Judgment: January 4th ,2005

PRESENT

HON'BLE MR.PRAKASH TATIA,J.

Mr. S.D. Purohit)
Mr. G.R.Singhvi), for the appellant.

Mr. J.R. Patel, for the respondent.

REPORTABLE
BY THE COURT:

1. The trial court decreed the suit of the appellant-plaintiff for eviction of his tenant-respondent, from the suit premises, vide judgment and decree dated 16.8.1994. The appellate court reversed the judgment and the decree of the trial court vide judgment and decree dated 5.4.1997. Hence, this second appeal by the appellant-plaintiff-landlord against the judgment and decree of the first

appellate court dated 5.4 1997.

2. Brief facts of the case are that the plaintiff-appellant, who was in service in the year 1974, let out one of his shop, out of his three shops, situated in his house to the defendant-deceased Kanhaiya Lal on 2.10.1974 on rent of Rs.110/- per month excluding the charges for the electricity, water and house-tax. The plaintiff filed the suit for eviction against the defendant-tenant on 28.10.1977. The plaintiff in his plaint stated that the suit shop was let out to the defendant for commercial purposes but instead of doing the business in his own name, the defendant obtained licence from competent authority for running the shop in the name of his wife and started business in the shop in the name of his wife without the permission of the plaintiff. Not only this but in violation to the terms and conditions of the tenancy agreement, the defendant-tenant started residing in the shop from 1.6.1976 with his wife and children. The defendant also damaged the property causing loss to the plaintiff. The plaintiff further submitted that plaintiff's son Chandra Shekhar is doing his business in the name of M/s Kamdhenu Aahar Industries in Shop No.1 of the plaintiff and he wanted to have show-room for his business, therefore, the plaintiff is in need of the shop no.3, which was let out to the defendant. The plaintiff also sought decree for eviction on the ground of default in payment of rent by the defendant

as he did not pay the rent of more than six months.

3. The written statement was filed by the defendant-deceased Kanhaiya Lal on 21.3.1978. In the written statement, the defendant submitted that the premises was taken by him on rent for his residence as well as for running business in the name of his wife and the suit premises was not taken on rent only for commercial purposes. The defendant, after denying the allegation of default, submitted that the plaintiff wanted to get more rent from the defendant and submitted that plaintiff's son Chandra Shekhar is not doing the business in the name of M/s Kamdhenu Aahar Industry and there is no office of his business in shop no.1 and in fact, shop no.1 is in possession of P.J. Viren & Sons, therefore, there is no need of the shop in dispute for expansion of the business of plaintiff's son. The defendant further submitted that since five years have not passed to the tenancy of the defendant, therefore, the plaintiff's suit before expiry of five years from the date of the start of tenancy of the defendant on ground of plaintiff’s personal need is not maintainable.

4. The plaintiff amended his suit with leave of the court on 21.8.1984 and took a plea that the plaintiff retired from his service on 30.11.1983 and the plaintiff wants to do the business with his son in the shop in dispute and the

plaintiff has sufficient means for doing the business and, therefore, the plaintiff is seeking eviction of the defendant, now for his own need. Plaintiff further pleaded that he has no other suitable premises.

5. The defendant submitted reply to the newly added grounds on 25.11.1984. In reply to newly added para (7A) of the plaint, the defendant admitted that the plaintiff retired on 30.11.1983 but denied that the plaintiff is unemployed and submitted that the plaintiff, after retirement, joined the Central Arid Zone Research Institution, Jodhpur and from there he is getting good salary. It is also submitted that the plaintiff is of the advance age and he has no physical ability to do the business. In this additional written statement dated 25.11.1984, the defendant submitted that shop no.1 in which it was alleged that the plaintiff's son Chandra Shekhar is doing business, is in the tenancy of Radha Swami Typing Institute.

6. The trial court framed issues on 15.1.1985 which are relating to the default in payment of the rent for the premises, what is the effect of defendant's doing business in the name of his wife instead of his own name, whether the plaintiff retired from service in the year 1983 and wants to do his business with his son and, therefore, there is personal bona fide need of the plaintiff, whether the

defendant has already taken another shop in front of shop in dispute and because of this reason, defendant will suffer hardship in case decree for eviction is passed against the defendant.

7. The plaintiff further amended his plaint with the leave of the court by order dated 24.2.1987 and added a new ground for seeking eviction. New ground is that the defendant removed the partition wall and materially altered the premises. The amended plaint was filed by the plaintiff on 5.3.1987. The defendant submitted reply to the grounds by filing supplementary written statement on 21.8.1987.

8. The defendant submitted an application under Order 6 Rule 17 C.P.C. and sought amendment in the written statement to take additional grounds to contest the suit of the plaintiff which was allowed by the trial court on 17.11.1991 and amended written statement was filed by the defendant on 2.1.1992. The plaintiff filed the rejoinder to the amended written statement of the defendant on 3.2.1992.

9. Yet, there is one more application seeking amendment of the written statement by the defendant which was also allowed by the trial court vide order dated 1.3.1992 and the defendant submitted amended written statement on 14.4.1992.

10. This is how, a plaint which was filed in the year 1977 attained the final shape in the year 1987 and the written statement took the final shape in the year 1992 when last amended written statement was filed by the tenant. It consumed almost near about 15 years for completion of the pleadings before the trial court.

11. The defendant also submitted an application under Order 14 Rule 5 CPC on 19.5.1992 and the defendant proposed as many as five new issues but did not propose issue of non-maintainability of the plaintiff’s suit on the ground that the suit of the plaintiff is barred under sub-section (3) of Section 14 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (for short 'the Act of 1950'). However, the application of the defendant for framing five additional issues was dismissed by the trial court by order dated 6.8.1992. It will be worthwhile to mention here that initially issues were framed on 15.1.1985, after the amendment of the original plaint by the plaintiff and after inclusion of the ground of personal *bona fide* necessity of the plaintiff himself in place of need of plaintiff’s son. At this stage it will be relevant to mention, on 15.1.1985 and subsequently when additional issues were framed on 27.10.1987 and thereafter in the application of the defendant dated 19.5.1992 for framing additional issues, the defendant did not choose to request for framing of any issue about maintainability of the plaintiff’s suit in view

of bar u/s 14 (3) of the Act of 1950.

12. In the trial court, at the time of final arguments in the year 1994, the defendant raised objection founded upon sub-section (3) of Section 14 of the Act of 1950 and submitted that the plaintiff let out the premises for commercial purpose on 2.1.1974 and filed the suit for eviction on the ground of personal *bona fide* necessity on 7.10.1977,i.e., within five years from the date of letting out the premises, therefore, the suit of the plaintiff is not maintainable, rather the plaintiff's institution of the suit itself is against the mandate of the said provisions of law and consequentially the plaintiff's suit is liable to be dismissed only on this ground alone as the suit is barred by law.

13. The trial court decided this objection first, before deciding other issues, though no issue was framed on this objection of the defendant. The trial court held that the defendant himself in his written statement admitted that the suit premises was taken on rent for both purposes, i.e., for commercial as well as for residential use and the plaintiff also stated in his statement that though the premises was let out for commercial purpose but the defendant started using the premises for residential purpose therefore, suit premises was not let out only for commercial purpose. The trial court held that the court is

required to see the equities and observed that the objection of non-maintainability of the suit has been raised by the defendant after 17 years of the trial of the suit. The defendant did not demand for framing issue on this plea despite the fact that the defendant himself submitted an application under Order 14 Rule 5 C.P.C. and proposed several other issues but had not included any issue on the defendant's this plea. On these grounds, the trial court rejected the plea of the defendant about non-maintainability of the suit.

14. The trial court decreed the suit of the plaintiff on the ground of personal *bona fide* necessity of the plaintiff but decided issue of material alteration against the plaintiff and did not pass any decree on this count.

15. The defendant preferred appeal and the appellate court allowed the appeal of the defendant vide judgment and decree dated 5.4.1997. The appellate court held that since the plaintiff filed the suit within five years from the date of tenancy on the ground of personal *bona fide* necessity of the plaintiff, which is impermissible as per sub-section (3) of Section 14 of the Act of 1950, therefore, the suit of the plaintiff is not maintainable. In spite of the fact that the first appellate court held the suit is not maintainable as suit is barred by law, still reversed the finding of the trial court about

personal bona fide necessity of the plaintiff for the suit premises on the ground that since the plaintiff filled the suit within the five years of letting out the premises, which was not permissible in view of the bar created by sub-section (3) of Section 14 of the Act of 1950, therefore, the plaintiff's need cannot be accepted as *bona fide*. And when the need cannot be treated *bona fide,* there cannot arise any question of comparative hardship in favour of the plaintiff. The first appellate court also held that the plaintiff himself in his cross-examination admitted that at the time of filing of the suit, one shop adjacent to the shop in dispute was not occupied by any tenant and in the opinion of the court, the shop is till lying vacant, therefore, the plaintiff's need cannot be accepted as bona fide. In view of the above reasons, the first appellate court reversed the decree for eviction passed by the trial court and dismissed the plaintiff’s suit.

16. Aggrieved against the above judgment and decree dated 5.4.1997, the appellant preferred this appeal which was admitted as this Court found that following substantial questions of law are involved in this appeal:-

> “1. WHETHER in case of oral agreement of tenancy between land lord and tenant, the user can be changed without written consent of the landlord?
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> 2. WHETHER the expression 'inconsistent with the purpose for which a tenant was admitted to the tenancy of the premises' can be proved by

oral evidence and attending circumstances where the agreement of tenancy is entered orally?

3. WHETHER in view of the finding recorded by first appellate court that the disputed premises was let out to the tenant-respondent for commercial as well as residential purposes both then in such a situation the provisions envisaged under sub-sec.(3) of Sec.14 of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (for short 'Act No.17 of 1950') will not be attracted inasmuch as its applicability can be extended only in respect of those premises which are let out for commercial or business purposes not for business-cum-residential purposes ?

4. WHETHER after excluding the applicability of sub-sec.(3) of Sec.14 of Act No.17 of 1950, in the present facts and circumstances, a plea raised by land lord plaintiff appellant regarding his reasonable and bona fide necessity would revive for consideration along with sub-sec.(1) and (2) of Sec.14 of the aforesaid Act. ?

17. The appeal was heard on merits and it was found that case involves more substantial questions of law, therefore, after hearing both the parties by detailed order dated 18.8.2004, following additional substantial questions of law were framed:-

(5) Whether the suit of the plaintiff filed on 28.10.1977 and was amended in the year 1983 is barred by sub-section (3) of Section 14 of the Act of 1950? and

(6) In case it is held that the suit of the plaintiff is not barred under sub-section (3) of Section 14 of the Act of 1950, then whether the finding recorded by the trial court on the issue of personal bona fide necessity of the plaintiff is vitiated because of misreading of the evidence and non-consideration of the material evidence and the finding of the first appellate court is based on assumption and has been recorded without reasons, and the plaintiff proved the case for

eviction against the tenant on the ground of personal bona fide necessity as required under Section 13 of the Act of 1950.

18. The learned counsel for the appellant vehemently submitted that bar against the institution of the suit by the landlord on the ground of personal *bona fide* need of the plaintiff created by sub-sec. 3 of Sec. 14 of the Act of 1950 applies to the those premises which are let out only for business purpose. Sub-sec. 3 of Sec. 14 is not applicable to premises for residential or let out for composite use like business and residential. When the defendant himself, in his written statement, clearly admitted that he took the suit premises for the residence of his family and also for the business of his wife than defendant cannot take plea that premises was let out for business purpose. The plea is against defendant’s own admission in the pleading. In the alternative, the premises is in use for composite purpose and therefore, also suit is not barred. The trial court was fully justified in holding that the suit premises was not taken on rent only for commercial purpose. Neither this finding has been reversed by the first appellate court nor there exist any reason for reversal of the finding. It is also submitted that the defendant, though in his written statement pleaded that the suit has been filed within a period of five years from the time of letting out, therefore, the suit is not

maintainable but said plea was not only casually taken but in view of the admission of the defendant himself in the written statement itself that he took the premises for his residential and commercial purpose, he did not intend to press this issue which is clear from the facts mentioned in the judgment of the trial court and also apparent from the record. It is also submitted that the first appellate court committed illegality in holding that the question of maintainability of the suit is required to be decided on the basis of the right of the plaintiff as on the date of filing of the suit and passing of about 14 years is irrelevant and the issue has not become redundant.

19. The learned counsel for the appellant submitted that even if it is held that on the date when the suit was filed, it was barred under sub-section (3) of Section 14 of the Act of 1950 even then that bar was not there when the trial court passed the decree against the defendant. Therefore, the appellate court should not have dismissed the plaintiff's suit. The appellant relied upon the judgments of the Hon'ble Apex Court delivered in the cases of (1) Martin and Harris Ltd. v. Addl. Dist. Judge (AIR 1998 SC 492), B. Banerjee v. Smt. Anita Pan (AIR 1975 SC 1146) and Anandilal Bhanarlal and another vs. Smt. Kasturi Devi, Generiwala and another (AIR 1985 SC 376). The learned counsel for the appellant also relied upon the judgment of this Court delivered in the case of Chandgi Ram vs. Babulal

(1997 DNJ(Raj.) 308), in support of his argument that even when the suit is filed within the prohibited period of limitation for filing the suit, in such situation, after the expiry of the period of five years, the landlord can be permitted to amend the plaint so as to incorporate the ground of personal bona fide necessity of the plaintiff and the said amendment will not relate back to the date of the institution of the suit and in such a situation, the original date of institution of the suit is to be ignored as per the decision of the Hon'ble Apex Court given in B. Banerjee(supra). It is also submitted that a decree passed after the expiry of the prohibition period u/s 14(3) of the Act of 1950, cannot be treated as nullity in view of the decision given in the case of Shamsuddin vs. Jhanwarilal (1989(1) RLW 383).

20. Learned counsel for the appellant further submitted that, even if any benefit was available to the defendant-tenant-respondent as per Section 14(3) of the Act of 1950, he has waived his right to take benefit of law. It is also submitted that even a right given or created by the statute can also be waived by the parties for whose benefit the right was created by the statute. The Rajasthan Premises (Control of Rent and Eviction) Act, 1950 has not only a beneficial legislation for the tenant only but it is a welfare legislation, for the benefit of the tenant as well as for the landlord also, therefore, the law is required to

be construed in a manner so that it may achieve its object of benefit to the tenant as well as the landlord both. The sub-section (3) of Section 14 of the Act of, 1950 merely secures tenant's possession in the premises for five years in cases where the tenant has taken the premises for the commercial purpose. The object behind the provisions is that the deemed weaker section may earn his bread peacefully without fear of eviction from the place from where he is earning for himself as well as for his family members. The law cannot be interpreted in a manner to grant more benefit than it was intended by the legislature. In view of the above, the tenant should not have been permitted to take a plea by the trial court on a point for which no issue was framed by the trial court. The trial court even after permitting the tenant, decided in favour of the landlord-appellant but the first appellate court ignoring the aim and the object of enacting sub-section (3) of Section 14 of the Act of 1950 and ignoring the fact that the Act is beneficial legislation for not only the tenant but also for the landlord, allowed the plea taken by the defendant and secured the possession of the tenant beyond the period of five years for which there was security under the law regarding possession of the tenant.

21. The learned counsel for the appellant assailed the finding of the first appellate court on the issue of personal *bona fide* necessity of the plaintiff-landlord and

the manner in which the first appellate court decided the issue of personal *bona fide* necessity and comparative hardship and submitted that the first appellate court even did not care to look into the evidence of the witnesses nor looked into the documents and proceeded on the assumption only which is clear from the bare reading of the reasons given by the first appellate court while deciding issue of personal bona fide necessity of the plaintiff.

22. The learned counsel for the respondent-tenant raised serious objection about the pleas raised by the appellant-plaintiff before this Court, in second appeal. According to the learned counsel for the respondent, the plea of waiver and equity are questions of facts. The appellant did not raise these pleas before the trial court or the first appellate court. Even the appellant has not raised these pleas in memo of appeal; therefore, appellant can not be permitted to take these pleas in arguments in second appeal. It is also submitted that the appellant cannot be permitted to take new pleas in second appeal in view of the decision of this Court as well as of the Hon'ble Apex Court in the cases of (1) Abdul Vaheed vs. Amar Chand & ors. (2003 WLC(Raj.) UC 242) (2) C.K. Abdul Rehman vs. B.C. Putta Thayamma (2002 WLC(SC) 42), Kshitish Chandra Purkait v. Santosh Kumar Purkait & ors. (1997)(2) CCC 255(SC). Further it is submitted that there is neither issue nor evidence on question of waiver of defense by the defendant,

therefore, no opportunity is available to the defendant-respondent to meet this new plea and, therefore, the plea cannot be allowed at this stage. According to learned counsel for the respondent-defendant, the substantial question of the law is required to be set up by the appellant in the memo of appeal itself as held in the cases of (1) K. Raj & anr. vs. Muthamma (2001(2) CCC 98(SC) and (2) Muthu Gounder vs. Ammayee Ammal (2002(3) CCC 101(SC). In view of the judgment of the Hon'ble Apex Court delivered in the case of Kshitish Chandra Purkait(supra), the High Court has no jurisdiction to decide the question without formulating the point as substantial question of law. According to the learned counsel for the respondent, the substantial question no.4 framed by the court is not specifically for the point in dispute. It is also submitted that there is no illegality in the appellant court's holding that the right of the parties must be determined as they were available on the date of the filing of the suit and not on the basis of the right which accrued to them after institution of the suit and the plaintiff cannot be permitted to take advantage of the cause of action which arose subsequent to filing of the suit.

23. It is also submitted that the judgment relied upon by the learned counsel for the appellant Martin and Harris Ltd.’s case (supra) has no application to the facts of this case. The learned counsel for the respondent tried to

distinguish between the words “institution” and “entertain” and submitted that the language used in sub-section (3) of Section 14 of the Act of 1950, it is clear that the mandate of the law is against the institution of the suit itself and not merely a restriction for entertaining the suit. It is clearly provided in sub-section (3) of Section 14 that no suit for eviction of tenant shall *lie* if filed within the period of five years of commencement of tenancy. In the case of Martin and Harris Ltd.(supra), the distinction between “entertain” and “institution” has been made clear. The Hon'ble Apex Court observed that entertain means to adjudicate upon or to proceed to consider on merits and did not mean institution of the proceedings. Once, institution of the suit is bad then the suit is required to be ignored only. The learned counsel for the respondent tried to distinguish the judgments cited by the learned counsel for the appellants.

24. According to the learned counsel for the respondent, this Court held in the case of Ishwar Singh(1999 DNJ (Raj.) 298), if a decree is passed in violation of Section 14(3) of the Act of 1950 then the suit for declaration that such decree as nullity is maintainable and even this Court in a case where the eviction decree was upheld up to the High Court and when the first appellate court in a suit for injunction filed after the final decree, reversed the order of injunction, the High Court in revision, allowed the

revision petition and granted injunction which shows that an objection about nullity of the decree on the ground of sub-section (3) of Section 14 of the Act of 1950 can be raised even after when the decree attained the finality. In the case of Ashok Kumar vs. Suresh Chand & anr. (1995(2) CCC 72), this Court held that, in a suit for eviction of tenant, filed within the five years from tenancy, even if ground for eviction of the tenant on the ground of plaintiff's personal bona fide is added by amendment in the plaint after expiry of five years of tenancy still such suit will not become maintainable because the amendment in plaint will relate back to the date of filing of the suit and the suit would still be treated within five years of the tenancy.

25. On the issue of personal bona fide necessity, the learned counsel for the respondent submitted that though, substantial question of law has been framed by this Court about the personal bona fide necessity of the plaintiff-landlord but the finding of the first appellate court about the personal bona fide necessity of the landlord, which went against the appellant landlord, is a finding of fact and cannot be interfered with by this Court in second appeal.

26. I considered the submissions of the learned counsel

for the parties. I perused the record.

27. The core question involved in this appeal is whether the first appellate court was right in holding that the suit of the plaintiff is barred under sub-section (3) of Section 14 of the Rajasthan Premises(Control of Rent and Eviction) Act, 1950. Because of this, this court framed the following question:-

> (5) Whether the suit of the plaintiff filed on 28.10.1977 and was amended in the year 1983 is barred by sub-section (3) of Section 14 of the Act of 1950?

28. For deciding this issue first of all it will be necessary to find out the nature of the tenancy because if it is held that the rented premises is commercial then only bar of sub-sec.(3) of sec. 14 applies. As per sub-section (3) of Section 14, no landlord can institute a suit for eviction against his tenant before expiry of five years from the date of tenancy on the ground of his personal bona fide necessity if the premises has been let out for commercial or business purposes. In the case in hand, the plaintiff in this plaint very specifically pleaded that the suit premises was left out to the tenant for running a typing institute. Not only this but plaintiff sought decree against the tenant on the ground that the suit premises was let out to the tenant for running the typing institute but he started using the premises for residential premises. For

this plaintiff submitted an application for framing issue on 6.8.1986 but it appears from the order sheets of the trial court that no order on this application was passed by the court and even plaintiff did not sought any order on his this application in trial court or from first appellate court or even from this court in second appeal. (It is doubtful, if the court would have framed the said issue, whether the tenant would have argued that premises was let out only for commercial and business purpose.) So is the plaintiff's statement on oath in the suit. Encounter with the legal bar created by sub-sec. (3) of Sec.14 prompted the plaintiff to take help of the defendant’s admission in his written statement where the defendant took a stand that the suit premises was taken by him on rent for business as well as for residential purpose. Like plaintiff, when defendant found his own admission in his written statement is going against him, he also like plaintiff took somersault and is placing reliance upon admission of the plaintiff. Both, plaintiff and defendant want to get out from their own admissions made in the pleadings and in their statement on oath. Not only this that they want to get out from their admission but both, plaintiff and defendant, say that their opponent is telling truth. This is not because they have faith in other. This is because, it suites them more. Both, plaintiff and defendant want to apply principle of estoppel against each other. Such situation may be one of the reasons for declaring the

admission, not a conclusive proof of matter admitted by enacting Sec. 31 in the Indian Evidence Act, 1872. Sec. 31 says that admission may operate as estoppels and admission is not a conclusive proof of the matters admitted.

29. In such situation, it is for the court to find out the truth and for that purpose the court may examine the surrounding circumstances as well as the admission of the party. The facts of this case clearly reveal that the plaintiff, in his plaint as well in his statement on oath, unequivocally admitted that the suit premises was let out to the defendant-tenant for the purpose of running a typing institute. The plaintiff, in his plaint, used the word “shop” for the premises in dispute. The trial court framed issue no.1, to the effect that, whether the suit premises was taken on rent by the defendant for doing his own business (typing institute). The trial court recorded the finding in favour of the plaintiff on issue no.1 and held that both the parties admitted that the suit premises was taken on rent to run a typing institute. While deciding issue no.2, the trial court further held that the defendant was in government service at the time of letting out the shop and he started business in the shop in the name of his wife. In the light of these facts and reasons, the plaintiff can not take a stand contrary to his own case set up in pleading and contrary to his own admission on oath before the trial court. Observation of the trial court that

the suit premises was not taken on rent only for commercial purpose, while deciding defendant’s objection about maintainability of the suit under Section 14(3) of the Act of 1950, is not only contrary to the admission of plaintiff in his pleadings and admission in evidence but is contrary to the finding recorded by the trial court itself on issue no. 1. Even before the first appellate court, the argument was advanced on behalf of the plaintiff-landlord that the suit premises was originally let out for the commercial purpose but subsequently the use has been changed by the defendant-tenant. This argument also suggests that the suit premise was let out only for commercial purpose. The plaintiff's stand contrary to his own admission in the pleadings appears to be only an afterthought and to meet the objection of the defendant. The plaintiff failed to give any explanation even before this court, why he pleaded that suit shop was let out for commercial purpose if it was not let out for that purpose. It appears that the defendant who took the premises on rent for his typing institute, to meet with the plaintiff's allegation that the defendant after taking premises on rent for his typing institute started living in the shop, submitted that he took the suit premises for his typing institute is well as for his residential purpose. The plaintiff's admission appears to be voluntary whereas defendant admission may be to save him from being condemned for not using the premises for the purpose for which it was let out.

30. Therefore, the trial court while deciding the issue No 1 and 2 rightly held that suit premises was let out for commercial purpose and the first appeal court rightly up held that finding. The contrary finding of the trial court while deciding objection of the defendant about the maintainability of the plaintiff's suit in view the bar under sub-section 3 of Section 14, is self-contradictory as well as factually wrong. Hence, it is held that the suit premises was let out for the commercial purpose and not for residential use or for composite use.

31. Next, it is true that in view of the bar of sub-sec(3) of sec.14 of the Act of 1950, the suit when it was filed by the plaintiff, for eviction of his tenant, on the ground of personal necessity of his son was not maintainable. It also true that in view of the decision of the Hon'ble Apex Court delivered in the case of B.Banerjee v. Smt. Anita Pan (AIR 1975 SC 1146), the suit of the plaintiff so far as on that ground is required to be ignored. Still in the light of the same decision of the Supreme Court (B.Banerjee’s case) and in facts of this case suit of the plaintiff for his own need was and is maintainable. Reason is that the plaintiff retired from service in the year 1983 and amended the plaint in the year 1984 and sought decree for eviction of the tenant in the year 1984 on the ground of his own need in place of need of his son. By that time period of five

years already passed to the tenancy of the defendant tenant. In the year 1984, bar of sub-sec.(3) of sec.14 of the Act of 1950 had no application against the plaintiff's and the plaintiff could have instituted the suit for eviction of the defendant-respondent-tenant on the ground of his personal necessity. The plaintiff in stead of filling fresh suit after withdrawal of present suit amended the present suit and the trial court after hearing the defendant permitted the amendment by order dated 6.8.1984. In the light of the decision of the Supreme Court in B. Banerjje's case, the court, before dismissing the suit of the plaintiff on the ground of plaintiff's need (for his son's need), could have allowed the plaintiff to amend the suit. Here in this case before any immediate threat to the plaintiff's suit, the plaintiff (may unmindfully to the non-maintainability of his suit in view of bar of sub-sec. (3) of sec.14) and because of subsequent event of his retirement form service voluntarily amended his suit which fortuitously cured the defect of maintainability of the suit of the plaintiff. This fortuitous, circumstance saved the plaintiff's suit for which defendant cannot raise any objection.

32. Further, law laid down by the Supreme Court (B. Banrjee's case) is that when suit has been filed at a time on which it could not have been *instituted* then "....*the*

fresh pleadings can be put in by the plaintiff either in the suit, if that is pending, or in appeal or second appeal, if that is pending." And in that situation *"He begins proceedings on these new grounds only when he puts in his pleading setting out these grounds. In spirit and in letter he institutes his suit for recovery on the new grounds only on the date on which he puts in his new pleading. We cannot be ritualistic in insisting that a return of the plaint and a representation thereof incorporating amendments is the sacred requirement of the law. On the other hand social justice and the substance of the matter find fulfillment when the fresh pleadings are put in."* *(Emphasis supplied)*

33. The learned counsel for the respondent heavily relied upon the judgment of the Hon'ble Supreme Court delivered in the case of Siddalingamma and another vs. Mamtha Sheonoy (AIR 2001 SC 2896) in support of his plea that where the court has not excluded the doctrine of relation back while allowing the amendment of the plaint, the amendment shall relate back to the date of the filing of the original petition/plaint. The facts of the above case are that the landlord and his wife jointly filed the suit for eviction against the tenant on various ground and one of the grounds was that the landlord was suffering from 'Asthma' and respiratory problems and he is taking oxygen regularly from the cylinder and for medical treatment, he was frequently

required to be taken to Bangalore from the village situated at some distance from Bangalore. The landlord expired during the pendency of the suit. The landlord's wife herself, who was joined as party because she used to collect the rent, amended the plaint by moving an application on 22.1.1997. She submitted that she herself was not keeping well and she required better treatment which was available at Bangalore, therefore, she intended to shift from the village house to her own house situated in the city of Bangalore along with her adopted sons. The amendment application was allowed and the trial court decreed the suit of the plaintiff. In the revision, the High Court observed that “the principal cause pleaded in the eviction petition for shifting to Bangalore has ceased to exist on the death of original landlord.” However, the High Court observed that “that no doubt the petitioner has placed some material with regard to her ill-health but health is not such a serious one warranting her shifting to Bangalore.” The landlord's wife (who was also plaintiff in the suit) challenged the judgment of the High Court before the Hon'ble Apex Court. Hon'ble the Apex Court observed that “it is true that now the petition for eviction, as originally filed, the health condition of landlady herself and factum of children residing with her not being her own grandchildren were not pleaded, nevertheless evidence was allowed to be let in without objection and was recorded by the trial court. After taking note of the above facts, the

Hon'ble Apex Court observed that “the application for amendment under Order 6 Rule 17 of the CPC was moved and the deficiency in the pleadings stood removed by the amendment permitted by the trial court in exercise of its discretionary jurisdiction to do so.” In the background of these facts, the Hon'ble Apex Court held as under:-

> “On the doctrine of relation back, which **generally governs** amendment of pleadings unless for reasons the Court excludes the applicability of the doctrine in a given case, the petition for eviction as amended would be deemed to have been filed originally as such and the evidence shall have to be appreciated in the light of the averments made in the amended petition.” (Emphesis supplied)

34. A bare perusal of the above judgment clearly reveals that doctrine of relation back of the amendment of the plaint is a held to be a proposition which generally governs the subject and not a rule of law or procedure governing all cases. It will be worthwhile mention here that the earlier judgment delivered by the three judges bench decision of Hon'ble Apex Court in the case of B. Banerjee (supra), was not brought to the notice of the Hon'ble Apex Court wherein Apex Court held that “on such pleading being filed we may legitimately hold that the transferee landlord institutes his suit on grounds mentioned in cls. (f) or (ff) of sub-sec. (1) on that date.” The Hon'ble Apex Court further observed that “He begins proceedings on these new grounds only when he puts

in his pleading setting out these grounds. In spirit and in letter he institutes his suit for recovery on the new grounds only on the date on which he puts in his new pleading. We cannot be ritualistic in insisting that a return of the plaint and a representation thereof incorporating amendments is the sacred requirement of the law. On the other hand social justice and the substance of the matter find fulfillment when the fresh pleadings are put in.” Therefore, it is clear that in B. Banerjee's case (supra), the controversy was directly involved about the period from which the amended pleading will have effect. In view of the above judgment of the Hon'ble Apex Court and in view of the fact that the doctrine of relation back cannot apply in the cases where the relation back of the pleading will make the pleadings meaningless or it will be contrary to the purpose for which amendment was sought and permitted by the court. Further, the doctrine of relation back cannot apply in the cases where the filing of the petition/plaint on subsequent dates has important bearing and relevance to the time then the doctrine of relation back cannot apply even in cases where the court has not specifically passed the order while allowing the amendment application to make the amendment prospective.

35. It is true that ordinarily if the court while allowing the amendment of the plaint has not passed the order to make the amendment prospective it may be treated as from

the date on which suit was filed but this is not a rule of general application. If the amendment has been sought on the basis of subsequent event it can not relate back to the date of the suit because by this very purpose for the amendment of pleading may be destroyed. It will also be in total contravention to the reason for which the amendment in the pleading was allowed. In this case, the plaintiff by amendment pleaded that he retired in the year 1983 and wants to run a shop now. The court allowed the amendment of the plaint because after plaintiff’s retirement cause accrued to the plaintiff for seeking decree for possession of the suit shop from the tenant. How this amendment can relate back to the date of the suit? The plaintiff could have demanded possession of the property only from the year 1983 and not before that and therefore, could have sought decree for eviction against his tenant only from the year 1983. If such an amendment is made effective from prior to the year 1983, it will be inconsistent to the purpose for which amendment was sought and allowed. Therefore, where by the situation itself the amendment of the pleading cannot relate back to the date of the suit than even in absence of the specific order of the court while allowing the amendment in pleading, the amendment can be from the subsequent date only depending upon the fact and reason on the basis of which the amendment in pleading was allowed by the court.

36 Anandi Lal’s case (AIR 1985 SC 3760, heavily relied upon by the learned counsel for the respondent is a judgment delivered by two Hon’ble judges bench of the Supreme Court. In the Anandi Lal’s Case decision given by three Hon’ble Judges bench B. Banerjee’s case (AIR 1975 SC 1146) was considered. In Anandi Lal’s case Apex Court held that since suit was incompetent at the point of time when it was instituted, therefore, decree for eviction on the ground of personal necessity could not have been passed against the tenant. The above decision of the Supreme Court only apparently favours the respondent but in fact fully supports the appellant only. The Supreme court in Anandi Lal’s case again reiterated legal position as laid down in B. Banerjje’s case by observing that “of course, the respondent could have been permitted to file a fresh plaint claiming eviction under Section 13(1)(ff) of the amended Act and mater could have been remanded to the trial court”. By this the Supreme Court only followed the law as laid down in B. Banerjee’s case. However, Supreme Court did not grant opportunity to the landlord to amend the plaint by observing: - “But in the facts and circumstances of the case it would not be appropriate to adopt this course” (of permitting amendment of the plaint after twenty years). The Supreme Court in Anandi Lal’s case did not permit the amendment of the plaint because by that time twenty years already passed and here just reveres, more than twenty years have passed to the amendment of the plaint by now.

Here in present case, after amendment of the plaint by the plaintiff in the trial court, entire trial was completed on amended plaint. The order permitting amendment of the plaint is not under challenge nor could it have been under challenged. Therefore, the judgment relied upon by the learned counsel for the respondent helps more to the appellant-plaintiff-landlord rather than to the respondent-defendant-tenant.

37. In view of the reasons any decision laying down that, ***in all case*** where while allowing amendment of plaint the court has not expressly excluded the doctrine of relation back, the amendment shall relate back to the date of the filing of the original petition/plaint, cannot be a correct law as it is the proposition contrary to the law laid down by the Supreme Court in B. Banerjee's case (AIR 1975 SC 1146) and Anandi Lal's case (AIR 1985 SC 376).

38. The learned counsel for the respondent vehemently submitted that, since the plaintiff's originally filled suit was on the basis of the ground of his personal necessity, as necessity of landlord's family member is also deemed as landlord's necessity, therefore, by amendment of the plaint in the year 1984, the plaintiff has only supplied additional reason only in support of original cause of action which, according to plaintiff himself accrued to the plaintiff in the year 1977. According to the learned counsel for the respondent, this is not a case of

accrual of cause of action to the plaintiff in the year 1983.

39. The argument of the learned counsel for the respondent is founded upon wrong facts. In fact original ground for eviction was for establishing showroom for plaintiff's son's existing business. This pleading cannot be read as the suit for eviction of the tenant on this ground was barred by law. Suit to that extant is required to be ignored. The plaintiff pleading, as amended in the year 1984, alone can be read though the para no. 7 of the plaint about necessity of the plaintiff's son has not been deleted. Law declared by the Supreme Court in the above case clearly says to ignore para 7 of the plaint. According to learned counsel for the respondent himself suit as filed originally for eviction of the defendant-respondent-tenant, on the ground of plaintiff's need, is required to be ignored. By amendment of plaint in the year 1984, the *plaintiff has not supplied additional reasons for passing the decree for plaintiff's son's need (for establishing showroom for his son's business)* **but** sought decree for himself, ***for doing business in the shop-in-dispute*** *with his son*. The trial court also framed the issue that whether the suit shop is required by the plaintiff for doing business **in** the suit shop. The trial court has not framed the issue like whether the suit shop is needed for establishing showroom for plaintiff's son's business. Need of the shop

for showroom of the plaintiff’s son was a different need and a different cause than the need of the plaintiff himself. The need of the shop accrued to the plaintiff for doing business in the suit shop in the year 1983, after his retirement. The plaintiff pleaded that he will do business in the shop with his son and it is not the case of the plaintiff that he will join his son’s business. This need was not in existence in the year 1977 when the suit was filed. Therefore, in the facts of this case, the plaintiff by amendment in the plaint has not supplied additional reasons for passing decree against the tenant but in fact superseded earlier ground of eviction by substituting new ground and that is substitution of plaintiff’s own need by his son’s need.

40. The court framed the issue about need of plaintiff and not for the need of the plaintiff’s son. The plaintiff led evidence to prove his need. He stated that he is scientist in the filed of animal food and he wants to do the business of animal food. Shop is situated in the same building where he is residing. He will able to teach his grand children while doing business in the shop. He has sufficient fund with him. The first appellate court without considering the pleadings, issue and evidence and further, without considering reasons given by the trial court, totally influenced by wrong assumption of law that since the suit of the plaintiff is barred by law, therefore, plaintiff’s need cannot be considered as bona fide need. The reason

given is legally wrong. The first appellate court failed to appreciate that in cases where law prevents the landlord from filling suit for eviction against the tenant within specified period of time it does not mean that if need of the premises accrues to the landlord within that specified period than the landlord’s need shall be considered as non-bona-fide need. The above prohibition prohibits the suit for eviction by landlord against tenant even where there is bona fide need of the landlord for suit premises.

41. In view of above discussion, substantial question no. 5 is decided as above and it is held that the suit premises was let out for commercial and business purpose but suit of the plaintiff for eviction of the defendant-tenant, after amendment of the plaint in the year 1984 on accrual of the cause to plaintiff in the year 1983 was maintainable. The first appellate court committed error of law in holding that the suit of the plaintiff is barred by law, under Section Sec.14 (3) of the Rajasthan Premises (Control of rent And Eviction) Act, 1950.

42. This Court framed substantial question no.4 to the effect that in case the finding about the maintainability of the suit is decided in favour of the plaintiff, whether the issue of bona fide necessity would revive for consideration. The question was also raised during argument on questions no.4 and 5 that, since question of personal

bona fide necessity of the plaintiff is a pure question of fact, therefore, finding of fact recorded by the first appellate court cannot be interfered in second appeal. In the alternative, it is submitted that, if this court finds that the finding of fact, as recorded by first appellate court, is vitiated because of any reason than matter may be remanded back to the first appellate court.

43. The learned counsel for the appellant submitted that since the first appellate court decided the issue of plaintiff’s need for the shop on wrong assumption of effect of sub-sec.(3) of Sec. 14 of the Act of 1950, therefore, the finding recorded by the first appellate court on issue no. 3, 4 and 5 (framed in the suit) deserves to be set aside and findings recorded by the trial court may be restored. The learned counsel for the appellant submits that when the evidence is available on record then this Court itself may decide the question of fact and the matter may not be remanded to the trial court. According to learned counsel for the appellant, more than 23 years have already passed to the suit. More than 20 years have already passed to the retirement of the plaintiff. Plaintiff is still in position to do the business. Further delay in decision of the suit may be fatal for the plaintiff. The learned counsel for the appellant relied upon Rule 24 of Order 41 C.P.C., Which provides that where the evidence on record is sufficient then the appellate court may determine

the case finally. It is also submitted that in this case the trial court considered all the facts of the case and considered all the evidence produced by both the parties and recorded the findings of fact in favour of the plaintiff. The first appellate court neither could appreciate facts of the case nor could apply law correctly. Not only had this but the first appellate court even misread the evidence of the plaintiff. And only reason for reversal of trial court’s finding on issue of plaintiff’s bona fide necessity is founded upon misreading of evidence. The reason given by the trial court is fully supported by evidence of the plaintiff and there is virtually no rebuttal on material point by the defendant.

44. The learned counsel for the respondent initially tried to support the judgment of the first appellate court but finding it difficult (without admitting so), the learned counsel for the respondent submitted that in case the finding of the first appellate court on issues no.3, 5 and 8 are set aside, then the matter may be remanded back to the first appellate court so that the first appellate court may decide issues no.3, 5 and 8 afresh. According to the learned counsel for the appellant even after reversal of the finding on issues no.3, 5 and 8 by this Court in second appeal, the scope for deciding issue of fact by this Court itself is narrow.

45. It appears that the first appellate court, heavily influenced by wrong assumption of law and misreading evidence of plaintiff, plaintiff's son and evidence of defendant, reversed the finding of the trial court recorded on issues no.3, 5 and 8. As stated above, the first appellate court was under impression that in case the suit is filed by the landlord within the prohibition period as created by sub-section (3) of Section 14 of the Act of 1955, then the need of the plaintiff cannot be considered as bona fide. That was a finding recorded on wrong assumption of effect of law. In addition to above said reasons does not survives because this court already held that plaintiff's suit is not hit by bar of sub-sec. (3) of sec. 14 of the Act of 1950. Further, the first appellate court decided these three issues (regarding personal bona fide necessity of the suit premise, comparative hardship and partial evection), only on the basis of misreading of the evidence and on the basis of assumption rather than on the basis of evidence available on record. In fact the judgment of the first appellate court on these issues is non-speaking judgment. The first appellate court committed serious error of law in observing that in court's *"Khayal"* (my opinion); one of the shops adjoining to the shop in dispute was vacant at the time of filing of the suit and is vacant till today, and therefore, the need of the plaintiff cannot be accepted as bona fide. The first appellate court failed to appreciate that this was nobody's case, not of

even defendant himself. Rather, the defendant's case was that shop nos. 1 and 3 were let out to the tenant before filling of the suit by the plaintiff and after induction of the defendant as tenant in shop no.2. This stand of the defendant continued from the very beginning, i.e. from the year 1978 when he filed his first written statement in the trial court. The defendant's case in the written statement was that if there was any need of the plaintiff for any shop then the plaintiff would not have let out shops no.1 and 3. The first appellate court misread the evidence of the plaintiff is also apparent. The relevant portion of the statement of the plaintiff is that at the time of filing of the suit, 'In the shop adjoining to my house, there was no tenant and in my imagination (*Khayal*), the shop was vacant and today also there is no tenant in that shop. My son is doing some work.' The first appellant court picked up one incomplete sentence from the evidence of the plaintiff and that is "at the time of filing of the suit, a shop adjoining to this house was not on rent to any body, in my imagination (*Khayal*) the shop was vacant and today also there is no tenant". The first appellate court did not notice the next line of the statement that "my son Chandra Shekhar is doing some work" and thereafter the plaintiff stated that "Chandra Shekhar's business is in the name of Kamdhenu Aahar Industry. That was the case of the plaintiff from the very beginning in his plaint. The first appellate court further failed to notice that the plaintiff in his

statement categorically stated that when he was at Hyderabad, in his absence, his son was looking after the shops and was receiving the rent. If statement of the plaintiff is accepted, as accepted by the first appellate court than it destroys the case of the defendant who took the plea that shop no. 1 and 3, both were not in possession of the plaintiff but was in possession of his tenants. Therefore, the first appellate court read the evidence against the plaintiff which is in fact favours plaintiff.

46. The first appellate court further failed to notice that the defendant never put the question to the plaintiff's son that one of the shops was vacant when the suit was filed. Contrary to it, in cross-examination, the plaintiff's son stated that in the plaintiff's house, there are three shops. A question was put to the plaintiff's son that one P.J. Viren & Sons was doing the business of gas-burner in the shop no.1. That was the case of the defendant in the written statement he pleaded that the plaintiff let out the shop nos.1 and 3 to tenant after letting out shop no.2 to the defendant before plaintiff's filing present suit against the defendant. Therefore, inference can be drawn that at the time of filling the suit the shop no.1 was in possession of the plaintiff’s son and he was doing business in that shop but could not do well because shop was small and during pendency of the suit the shop was let out as it was not suitable for plaintiff’s business. The

plaintiff in his statement categorically sated that the shop no.1 is small one. The plaintiff also stated on oath that the shop in dispute is a bigger one. It has two openings of 8' wide. It has one urinal also. The defendant in his statement stated that shop no.1 there is only one shutter, whereas the shop in dispute has two shutters, opening in two sides. The plaintiff as well as his son, in their statements, stated that they will in need of bigger shop so that they may keep the animal fodder. Since from beginning it was the case of the plaintiff that shop no. 1 alone is not sufficient for business of animal food, therefore, in the facts of this case, letting out of shop no.1 to other tenants cannot be a ground to doubt the gaminess of the bona fide need of the plaintiff.

47. The first appellate court further failed to read evidence of the defendant himself. The defendant himself in his statement stated that shop no.1 was in the tenancy of P.J. Viren & Sons. The plaintiff got the possession of the shops in the year 1987 (present suit was filed in the year 1977). The defendant further admitted in his statement that in the shop no.1, there is STD Booth where plaintiff and plaintiff's son used to sit. The defendant's evidence only is to the effect that in fact defendant's son is not doing business in the name of Kamdhenu Aahar Industries. He admitted that at the time of the filing of the suit, the shop no.1 was in possession of the tenant. Therefore, the

finding of the first appellate court on this fact vitiated because of the misreading of evidence of the plaintiff and non-consideration of the evidence of P.W.2 Chandra Shekhar and the evidence of the defendant himself.

48. The trial court considered the evidence of the all the witnesses and held that the plaintiff is a scientist in the field of animal fodder and he wants to do the business in the same field. The trial court further held that in the background of the knowledge of the plaintiff he has long experience of the business. The plaintiff's son will help the plaintiff in doing the business. The trial court found that there appears to be no reason to disbelieve the statement of the plaintiff and, therefore, the plaintiff fully proved his bona fide need. The first appellate court has not reversed the above finding of the trial court. There appears to be no reason for disbelieving the plaintiff's statement on this point because it is not disputed that the plaintiff is a scientist and he worked as scientist for long period. He decided to do the business himself. His son started the business of animal fodder but because of shortage of space he could not do well. The trial court correctly understood the issue which was framed after amendment of the plaint and recorded finding that the plaintiff will do the business and his son will help him.

49. Order 41 Rule 24 C.P.C. empowers the appellate court

to decide the case finally in case sufficient evidence is available before the appellate court to enable the appellate court to pronounce the judgment. For this, the appellate court has been given power to re-settle issue, if necessary and finally determine the suit. The matters can be remanded under Rules 23, 23A, or under Rule 25 of the Order 41 C.P.C., in cases where the decree is passed by the trial court on preliminary point and is reversed by the appellate court or where the appellate court thinks that retrial is necessary. In the present case evidence available on record is sufficient for deciding the case. There is no need for retrial or taking evidence or framing new issue in this case. Both the parties led evidence on issues and argued the matter before both the courts below on all the issues which were framed on the basis of the pleadings. It is not a case where the first appellate court did not decide the issue at all about personal necessity of the plaintiff. And in view of Order 41 Rule 24 C.P.C., it will not be proper for this Court to remand the matter back to the first appellate court. The additional reasons are that the suit was filed in the year 1977. The plaintiff, who retired in the year 1983, is seeking decree for eviction of his tenant on the ground of personal bona fide necessity. Therefore, also it will be absolutely unjust and improper to send the matte back to the first appellate court for deciding issues which can be decided by this Court in the light of the powers given under Order 41 Rule

50. The learned counsel for the respondent tried to point out towards the evidence of the witnesses and particularly of the plaintiff himself to show that the case set up by the plaintiff has not been proved by the plaintiff. The thrust of the argument of the learned counsel for the respondent was on the ground that the plaintiff's son was not doing the business and, therefore, the very foundation of the ground is missing. The argument of the learned counsel for the respondent proceeded on assumption that the suit even after amendment of the suit remained for the necessity of the plaintiff's son and for establishing the show-room in the shop in dispute. That assumption of the learned counsel for the respondent is wrong in view of the reasons given in preceding paras while discussing the effect of the amendment of the plaint in the year 1983. The learned counsel for the respondent could not dispute that the plaintiff is a scientist and was serving and retired in the year 1983. He has shown his willingness to do the business in the same field in which he is scientist. The age of the plaintiff is the hurdle in the way of the plaintiff, is the argument advanced by the learned counsel for the respondent but the facts which have come on record in evidence clearly reveals that the shop in dispute is situated in the house of the plaintiff himself and he can do the business with the help of his son and he can

discharge his family obligation of taking care of his grand-sons. The contention of the learned counsel for the respondent is that there are no pleadings about the plaintiff's being scientist and he will teach his grand-sons in the shop in dispute in addition to do the business. I do not find any force in the contention raised by the learned counsel for the respondent because it is admitted fact that plaintiff is scientist. He was in service and even after his retirement, according to defendant, he was engaged in research institute, therefore, defendant cannot question plaintiff’s capability to do the business. The defendant himself admitted that his wife has already started same business of photo copying in another shop in front of the shop in dispute in partnership from 1981, therefore, in view of this fact the plaintiff cannot have any hardship if he vacates the shop in dispute. The first appellate court did not consider this fact also.

51. So far as contention of learned counsel for the respondent is about lack of pleadings about suitability of the more suitability of the suit shop in comparison to shop which was in possession of the plaintiff is concerned has no material bearing in the facts of this case. The reason is that the totality of the facts discloses that plaintiff originally sought decree for possession of the suit shop with a plea that he needs additional accommodation for his son’s business. In year 1977 he found the Shop no. 1 not

suitable in measurement for the business. After his retirement plaintiff came out with case that he will do the business in the suit shop. Suit shop has two shutters, 8’ wide each and opening in two sides. The suit shop has one 8’ wide shutter that too opening in one side only. Defendant also led evidence on the size of the shops and contested the suit on suitability of the shop for the plaintiff; therefore, the defendant cannot take this objection and further, no prejudice has been caused to the defendant due to any defect of pleading.

52. Therefore, substantial questions of law no. 4 and 6 are decided in favour of the appellant-plaintiff and it is held that the after reversal of finding of the first appellate court on maintainability of the plaintiff’s suit by this court, the issue of personal bona fide necessity of plaintiff required to be decided again.

53. The finding of the trial court recorded on issues no.3, 5 and 8 are based on complete consideration of the evidence available on record and the trial court objectively considered the facts of the case which are not found by this Court even after looking the evidence produced by both the parties, as wrong in any manner. The trial court considered the fact of age of the plaintiff also and considered the comparative hardship which may be caused to the parties in case decree for eviction is

granted and in case decree for eviction is not granted. Therefore, the findings of the first appellate courts on issues no.3,5 and 8 are set aside and the findings of the trial court on these issues are maintained.

54. On consideration of facts and law, this court found that the first appellate court committed error of law in reversing the findings of the trial court on issues no. 3, 4 and 5. In view of the above, the finding of the first appellate court on issues no.3, 5 and 8 deserves to be set aside and hence set aside.

55. Substantial questions no.1, 2 and 3 in fact became irrelevant. Rather, in fact they are not arising in the present appeal. The plaintiff originally filed the suit for eviction on the ground of change of user of premises by the tenant but the trial court did not frame issue on this ground. The plaintiff submitted an application on 6.8.1986 for framing issue, that the decree for eviction may be passed in favour as the defendant has started using the commercial premises for residential purpose. That application was not pressed by the plaintiff and therefore, no order was passed by the trial court on this application. By not pressing the application the plaintiff waived his right to seek decree on the said ground of inconsistent use of the premises. When the plaintiff cannot get any relief in case substantial questions no.1, 2 and 3 are decided in

favour of the plaintiff then issues are only of academic interest.

56 In view of the above discussion, the appeal of the appellant is allowed with cost and the judgment and decree of the first appellate court dated 5.4.1997 is set aside and the judgment and decree of the trial court dated 16.8.1994 is restored.

(PRAKASH TATIA),J.